United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 960

Case No. 1055: QASEM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Ali Qasem, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 31 January 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 28 September 1999, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 December 1998, the Applicant, after making the necessary corrections again filed an application containing pleas which read as follows:

"***Pleas***

1. The decision of the Commissioner-General should be reversed because it relied on the conclusions of a Board of Inquiry which was improperly constituted.

   a. The Board consisted of ... [a] chairperson and ...[a] secretary.

   b. [The secretary] was directly supervised by ... [the chairperson] and lacked any knowledge concerning the process of tenders.

   c. The Joint Appeals Board itself recognized these flaws and held that the composition of the Board of Inquiry may have affected its judgement.

2. The fact that the Commissioner-General changed the termination shows that even he had serious doubts about the validity of the charges and the severity of the outcome.

3. The decision of the Board of Inquiry was based on circumstantial evidence and on an incorrect 'process of elimination' to find against [the] Applicant and should itself also be set aside.

4. In light of the above and given that [the] Applicant has a near flawless record spanning 33 years of integrity, professionalism and loyalty, [the] Applicant is requesting reinstatement and full benefits on the basis of continuation of employment as of the date of his termination commencing May 2, 1997 until retirement at the age of 60 in the amount of JD [Jordanian Dinar] 65,404.1 on the basis of his salary JD 827.90 per month plus yearly increments (...).

5. [The] Applicant is requesting compensation for the damage to his good reputation and good family name which have been tarnished as well as emotional distress and the denial of any opportunity of future gainful employment."

Whereas the Respondent filed his answer on 23 June 1999;

Whereas the Applicant filed written observations on 4 October 1999;

Whereas, on 9 May 2000, the Respondent submitted written comments on the Applicant's written observations;

Whereas, on 24 May 2000, the Applicant submitted comments on the Respondent's submission of 9 May 2000;

Whereas, on 8 June 2000, the Respondent submitted his comments on the Applicant's submission of 24 May 2000;

Whereas the Applicant submitted further comments on 23 June 2000;

Whereas, on 16 July 2000, the Respondent submitted additional comments on the Applicant's submission of 23 June 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA, at the Ramallah Men's Training Centre, West Bank, on 15 December 1964 as an Area staff member in the capacity of Clerk/Typist at the grade 5, step 1 level, on a temporary indefinite appointment. On 1 January 1966, he was given a probationary appointment to the post of Clerk B, which was extended until 31 March 1966. Effective 1 April 1966, he received a promotion to grade 6. On 10 December 1993, he was promoted to the post of Deputy Field Supply and Transport Officer (D/FSTO) at grade 16.

On 16 April 1997, the Acting Director of UNRWA Operations, West Bank, convened a Board of Inquiry (BOI) comprising the Field Administration Officer (FAO), an Income Generation Officer and an Assistant Public Information Officer to investigate the facts surrounding the interference with a fresh food tender, which was conducted in April 1997, by a UNWRA Teacher. He asked the BOI to address the fact that the UNRWA Teacher appeared to have possession of confidential information about the value of the lowest tender submitted by one of the bidders. The BOI was asked to determine how the UNRWA Teacher had obtained his information and the possible involvement of the UNRWA Supply staff in the matter. The BOI was asked to submit its report by 23 May 1997. The BOI was also asked to follow the guidelines of the Legal Adviser as set out in his inter-office memorandum dated 17 March 1997 (LEG 262), regarding BOI's and Other Investigations.

The BOI began its work on 29 April 1997. Three members were nominated to the BOI, but one was unable to participate so the Board comprised two members, the Chair and the Secretary.

On 2 May 1997, upon the suggestion of the BOI, the Acting Director of UNRWA Operations advised the Applicant that he was suspended from duty without pay immediately, pending investigation of the charges.

The BOI submitted its report on 16 May 1997. It established that on 12 March 1997, UNRWA invited tenders for the supply of groceries and fresh fruit and vegetables to Qalqilia Hospital and the UNRWA Teacher Training Centers. Having been warned by the Supply Control Officer (SCO) that irregularities had occurred during a similar tender in 1995, the Field Supply and Transport Officer (FSTO) decided to open the tender to the public and not restrict it to recommended suppliers. The tender was announced via an advertisement in the local papers on 12 March 1997. Before the tender was closed, the FSTO received several calls from an unnamed Hebron supplier who spoke of fear of irregularities in this tender and of involvement of senior staff. The FSTO assured him that correct procedures would be followed.

The tenders were received by the FAO's office and kept in a locked box until 1 April 1997, when the Tender Opening Committee (TOC) met. The TOC members opened 22 bids on 1 April 1997. The Applicant (the D/FSTO) and several other Area staff members were present for the opening of the bids. Bids were initialed and delivered into the custody of the Applicant. On the afternoon of 1 April, the Applicant, contrary to his normal behaviour, remained in the Office after hours. The bids remained in his possession until 2 April 1997, when he delivered them to the SCO for analysis. During the time the documents were in his possession, a telephone call was made from the D/FSTO's office to a supplier, Mr. E. J.

The BOI noted that Applicant received the results of the tender analysis from the SCO on 3 April 1997. On the same day, the SCO made a telephone call to Mr. E. J., in the presence of the Applicant, to clarify certain units of measurement that appeared on the bid. The Applicant also called Mr. E. J. twice on 3 April. Also on the same day, the D/FSTO hand-delivered a letter to Mr. E. J., requesting him to clarify VAT charges.

On 5 or 6 April 1997, Mr. M. W., the lowest bidder for the provision of fresh fruit and vegetables to the Hospital, was visited by Mr. Y. D., an UNRWA Teacher, whose brother, Mr. I. D., was the second lowest bidder for the provision of fresh fruit and vegetables to the Hospital. Mr. Y. D. tried to persuade Mr. M. W. to withdraw his tender in favour of his brother. By facsimile dated 9 April 1997, Mr. M. W. withdrew his tender. The next day, on 10 April 1997, the SCO and the Administration Officer (Supply and Transport) interviewed Mr. M. W., who informed them that he had withdrawn his bid following pressure to do so from Messrs. Y. D. and I. D. Also on 10 April

1997, Mr. M. W., during an interview with the SCO and the Administration Officer, Supply and Transport, withdrew his withdrawal in writing and reaffirmed his willingness to execute the bid at agreed upon prices.

The BOI concluded that Mr. Y. D., his brother Mr. I. D. and Mr. E. J., had been in possession of confidential information concerning the identity of the lowest bidder, and the amount and details of his bid. It also concluded that Mr. I. D. used this information to pressure Mr. M. W. into withdrawing his bid, and that the confidential information must have been received, directly or indirectly, from UNRWA staff. The BOI concluded that the Applicant was responsible for the dissemination of the confidential information eventually received by Mr. Y. D. and Mr. I. D. for the following reasons:

- The Applicant's improper contact with Mr. E. J.;
- The Applicant's demeanor when he gave evidence; and,
- The process of elimination. Only the SCO, the FSTO and the D/FSTO (the Applicant) could have leaked the information. Having found no improper behaviour on the part of the SCO and the FSTO, this left the Applicant.

On 23 June 1997, the Acting Director of UNRWA Operations communicated the BOI's conclusions to the Applicant, and advised him that he had accepted these conclusions and was terminating the Applicant's services for misconduct under staff regulation 10.3 and staff rule 110.1, with effect from 2 May 1997, the day he was suspended from duty.

On 1 July 1997, the Applicant wrote to the Director of UNRWA Operations, West Bank, and asked him to review the Acting Director's decision. On 9 July 1997, the Applicant again wrote to the Director of UNRWA Operations questioning the composition of the BOI. On 1 August 1997, the Director of UNRWA Operations responded to the Applicant's request for review and advised him that he saw no reason to reverse the termination. On 5 August 1997, the Director of UNRWA Operations advised the Applicant that the Legal Department had informed him that there was no requirement that three members serve on a BOI.

On 2 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 27 April 1998. Its evaluation, judgement and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGEMENT

20. In its deliberations the Board examined all documents cited before it, including the Appellant's personal file and came out with the following

...

(c) By reference to the composition of the Board of Inquiry, the Board noted that the Board of Inquiry consisted of two persons, the Chairperson of the Board and the secretary. Although it is not a requirement for the Board to consist of three persons, it is only logical that three persons can issue a more objective decision than only one member and a secretary.

(d) By reference to the report of the Board of Inquiry, the Board noted that the report stated that '*The Board is unable to make any findings as to the alteration of the bid. However there is evidence that D/FSTO* ***may have been*** *involved in the withdrawal of the lowest bidder on the tender. Although the Board is aware that testimony from suppliers is often motivated by self-interest, it believes that D/FSTO's involvement* ***is possible***.' It is obvious from this statement that the Board does not have any concrete evidence to the involvement of the Appellant but only circumstantial and doubtful evidence, and since the evidence was given from outside suppliers who have their interest to protect, the Board is of the opinion that the Appellant should be given the benefit of the doubt.
Furthermore, the report stated that '*The Board finds it significant that [Mr. E.J.] expressed surprise that he did not win the tender this year, as he stated that he knew that he was the lowest. He could only have known this if the information had been leaked. ... This is corroborated by ...'s testimony (phone call)...*'. The Board noted that a testimony on the telephone does not constitute credible evidence because the identity of the person on the phone can easily be manipulated.

(e) The Board also noted that a telephone call from an unnamed supplier who spoke of fear of irregularities in this tender and involvement of senior staff, a supplier who is protecting his interests in the first place and not the interest of the Agency is something very normal and happens almost on daily basis. The same also applies to the lowest bidder who was not eventually awarded the bid.

(f) The Board noted that there was no evidence that the Appellant received money or that he benefited from leaking out information about the bid, also the irregularities themselves were not actually proven.

(g) By reference to the Appellant's personal file, the Board noted that the Appellant had an excellent record through out his years of service with the Agency.

(h) In this context, the Board could not establish that there was any concrete evidence that actually convicts the Appellant, only evidence that is built on doubts raised by unidentified witnesses who are after their own interests.

IV. RECOMMENDATION

21. In view of the foregoing ..., the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed."

On 4 June 1998, the Commissioner-General transmitted a copy of the JAB's report to the Applicant and informed him as follows:

"...

I have carefully reviewed the Board's report and considered the matters noted by the Board. I also note that the Board does not appear to address or analyze the basis upon which the Board of Inquiry reached its conclusion that you were the UNRWA staff member who disseminated confidential information. The Board of Inquiry found that the contact between you and a supplier during a critical time period to be 'extensive' and 'highly irregular', and concluded that is was 'improper'. The Board of Inquiry, which was best placed to assess the demeanor and credibility of the witnesses, found your attitude during the inquiry to be one of 'disinvolvement and disinterest'. The Board of Inquiry also found that the confidential information (i.e. the analysis of the bids) was known only by three senior UNRWA Supply staff, and that by process of elimination you were the only person who could have disseminated the information. The Board does not address these matters in its report, and as a result the report is seriously flawed and of limited assistance to me.

I further note that the Board does not reference, in support of its recommendation, your allegations that the Board of Inquiry 'had taken a decision in advance to victimize and incriminate me' and that the decision to terminate your employment was based, *inter alia*, on the 'conspiracy of certain colleagues whose attitude was generated by personal hatred and vindication', which suggests to me that they were considered by the Board to be without merit. Further and in any event these allegations are unsubstantiated by you.

I am not persuaded that there was no reasonable basis for the Board of Inquiry to reach the conclusion it did with respect to your involvement in the dissemination of confidential information. Consequently, I believe that termination of your employment with the Agency was appropriate. However, I am concerned that the mode of separation, namely termination for misconduct, may have been too harsh in light of your length of service with the Agency and relatively clean record (written censure and one day suspension without pay in 1984) prior to this matter. Accordingly, I direct that the mode of separation be changed from termination for misconduct to termination in the interest of the Agency. Your appeal is allowed to that limited extent.

..."

On 10 December 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The BOI that investigated the allegations made against him was not properly constituted. It only had two members rather than the required minimum of three, and one of the members was a supervisor of the other. As a result "impartiality was not demonstrated and objectivity [was] questionable".

2. The BOI's allegation of improper contact between himself and one of the bidders, its dissatisfaction with his demeanor as well as its use of a "process of elimination" in making its decision "fail to establish a reasonable basis for the decision reached by the [BOI] and subsequently [by] the Commissioner-General".

Whereas the Respondent's principal contentions are:

1. The size of an investigating team does not in and of itself determine whether the team's findings are objective or correct or whether due process has been observed. Neither of the members of the BOI was ever a subordinate of the other.

2. While the BOI "did not establish when or how the Applicant disseminated confidential information, there was sufficient evidence to support [its] findings that he was nevertheless responsible".

The Tribunal, having deliberated from 11 July to 2 August 2000, now pronounces the following judgement:

I. The Applicant takes issue with the composition of the BOI established to investigate the alleged leaks of confidential information obtained from the analysis of some of the tender documents, with the alleged inequality of the positions or status of the two members who actually served on the BOI and with their respective expertise and qualification to carry out the said inquiry.

II. The improper composition of a body is in principle a procedural irregularity, which taints the exercise of a discretion (Judgement No. 172, *Quémerais* (1973)). The issue is whether the BOI was in this case improperly constituted.

III. The BOI had been convened by the Acting Director of UNRWA Operations on 16 April 1997. He had initially appointed a Field Administration Officer, an Income Generation Officer and an Assistant Public Information Officer to form the BOI, but as noted by the BOI in its report due to the unavailability of the Assistant Public Information Officer the Board was assisted in locating witnesses and translating testimonies by two other persons who were not actual members of the BOI. The BOI was advised to "follow [the Legal Adviser's] guidelines, outlined in his LEG262 of 17 March 1997, copied to you, in the course of the conduct of your inquiry."

With regard to the composition of the BOI, the Legal Adviser's memorandum stated:

> "When you have drafted the terms of reference, you will be in a position to judge the skills or special knowledge needed by the members of the Board and whether any staff members are likely to be connected with the subject matter of the Enquiry. With this information, you should select the members of the Board, as a general rule, three persons, one whom is designated as the Chairman. The members should not be involved in the matter, be a supervisor or subordinate to any of the staff members who may be the subject of the inquiry, be a supervisor to any other Board member or be in a position where doubt might be cast on their independence. The Board should include one or more members with the technical skills required for the particular inquiry, including, if possible, a legally qualified member".

IV. In the instant case, the Acting Director of UNRWA Operations, West Bank, had initially intended that the BOI should be composed of three persons and had nominated three persons to serve thereon. Because of the unavailability of the Assistant Public Information Officer it carried out its investigations and issued its report as a two-person BOI.

The FAO, who was a P-4, was appointed and designated as the Chair. The Income Generation Officer, who was a P-3, was designated as Secretary. The Income Generation Officer did not work in the Department of Administration where the FAO (the Chair) worked. Thus, they should be viewed as professional colleagues rather than superior and subordinate.

The Applicant claims that because BOI comprised two rather than three members, it was not a valid BOI nor did it accord with the terms of the Legal Adviser's memorandum of 17 March 1997. According to the Applicant, a three-member BOI was essential to examine the complex findings of fact. The objectivity and impartiality of the recommendations would have been best maintained by a three-member BOI instead of a two-member BOI, where one was designated Secretary.

V. The Tribunal is satisfied that these objections must fail. Firstly, the Tribunal is satisfied that the contents of the Legal Adviser's memorandum of 17 March 1997 are advisory rather than mandatory. Secondly, the memorandum expressly states that a BOI should comprise three persons "as a general rule". The Tribunal is satisfied that there is no legal requirement as to the number of persons to be appointed to a BOI. Furthermore, having examined the report and the workings of this BOI, the Tribunal is satisfied that no shortcomings are evident, although it consisted of two rather than three members.

When the Administration wishes to have such matters investigated, the Tribunal is satisfied that there are no mandatory procedures or requirements as to how this should be done and that there is no legal obligation as to the number of persons appointed to carry out such investigations. What is paramount is that such investigations should be carried out fairly and that no actual or perceived injustice or denial of fair procedures should be apparent. The Tribunal is further satisfied that in the present case the relationship between the Chair and the Secretary was not such as to cause concern. There is no evidence to support an assertion that the Secretary was in any way beholden to or influenced by the Chair and, therefore, not independent or impartial.

As to the suggestion that neither the Chair nor the Secretary had sufficient expertise to conduct the BOI investigation, again this submission must be rejected by the Tribunal. It is clear from the workings of the BOI and from its findings that the members had ample understanding of the evidence and the issues involved which enabled them to discharge their functions in an appropriate and a satisfactory manner.

VI. The Applicant also challenges the manner in which the BOI conducted its investigation and deliberations, which resulted in it drawing inferences and making findings adverse to him; the manner in which the report of the BOI was considered and acted upon by the Acting Director, UNRWA Operations, West Bank, who terminated the Applicant's appointment for misconduct; the manner and/or propriety of the review of that decision by the Respondent in light of the JAB report (which effectively cleared the Applicant of the allegations of wrongdoing); and the propriety of his decision to confirm the termination of the Applicant's appointment, save that it should be "in the interest of the Agency" rather than "for misconduct".

The fact that the termination of service was on the record ultimately "in the interest of the Agency" does not alter the fact that the dismissal was for misconduct and that the procedures followed had to comply with at least the general principles of law relating to disciplinary procedures. In Judgement No. 939, *Shahrour* (1999), the Tribunal explained the law in relation to terminations in the interest of the Organization.

VII. It is accepted by the Respondent that the case against the Applicant consisted entirely of circumstantial evidence. There was no proof that he leaked the confidential information. Nor did he make any incriminating admission. The finding made against him, that he was the person who had leaked the confidential information, was an inference drawn by the BOI from what they found to have been "suspicious circumstances" and "a process of elimination".

As held by the Tribunal in Judgement No. 934, *Abboud et al.* (1999), paragraph XXX, in relation to Applicant Shehabi, "[i]n order to find wrongdoing on the basis of circumstantial evidence it is necessary to show that the conduct established is not reasonably consistent either with an innocent explanation or with one at variance with the misconduct charged."

The BOI purported to justify its findings that the Applicant was responsible for the leaking of confidential information on the following grounds:

(i) That there were only three senior staff members of UNRWA who might have possessed the detailed knowledge which the BOI found had been leaked to the supplier Mr. E. J., and in turn imparted by him to another supplier.

(ii) That the fact that the Applicant remained after hours on 1 October 1997 was suspicious, in that he was in possession of the various tender documents and his telephone was used for a call after 3.00 o'clock to Mr. E. J.

(iii) That there were a number of telephone calls made from his office to Mr. E. J. between 1 and 3 April 1997, which greatly increased the BOI's suspicion as it found that communications between the Applicant and Mr. E. J. at this particular time would have been both irregular and inappropriate.

(iv) The Applicant's demeanour when giving evidence. The BOI characterised his attitude as one of disinvolvement and disinterest, as if the irregularities had occurred in another department. It described him as being either unaware of the seriousness of the issues or uncaring. It recorded that he had expressed a lack of concern over the leaking of information referring to it as "trivial" and describing the monetary difference between the amount of the relevant part of the lowest tender and the second lowest tender as "peanuts". The BOI found that the Applicant's responses when asked to comment on evidence given by other persons, were unconvincing and it appears to have taken this as evidence of evasiveness on his part or of a lack of co-operation.

VIII. The BOI was satisfied that so detailed was the knowledge imparted to Mr. E. J. and ultimately to another supplier that only three persons concerned with UNRWA could have been privy to same. It accordingly narrowed the field to three suspects. The Tribunal, having examined the evidence giving rise to this conclusion, is concerned as to how the conclusion was reached and as to whether it was in fact justified. For instance, the Applicant gave evidence before the BOI that he had observed Mr. E. J. in the office of the SCO looking at his bid after it was submitted and that he, the Applicant, had reprimanded the SCO for permitting a bidder to look at his documents. It was the Applicant's contention before the BOI that Mr. E. J. may have abused this occasion to pry into documents and to

obtain the information that was allegedly leaked. The Tribunal is concerned that the report of the BOI never dealt with this issue, never seems to have examined it for its possible implications, and more disturbingly, still never saw fit to recall the SCO to put this allegation to him.

IX. The Applicant also argued that the information found to have been leaked might have come from members of the TOC who had opened the tender documents, in addition to the "three suspects" identified by the Board. Again this submission does not appear to have been assessed or adequately taken into account by the BOI except to suggest that it was unlikely that the members of the TOC, by their mere presence, would have gained sufficient details to be responsible for the leaks found to have occurred. The Applicant had given evidence that his remaining after hours at work on 1 April 1997 was not unusual. The Tribunal notes that he had received many accolades and commendations for his attention and devotion to duty in the past. The BOI does not appear to have examined how frequently the Applicant may have worked late but jumped to the conclusion that his working late on 1 April 1997 was sinister and suspicious. Furthermore, the Applicant provided to the BOI an innocent explanation for his contact with Mr. E. J. on the telephone on the dates concerned and for the fact that he had hand-delivered a letter to Mr. E. J. on 3 April. Again these matters do not appear to have been evaluated by the BOI. It is also apparent that the Applicant had known at all times that calls made from his telephone could be traced. This raises the question as to why he would have used his telephone to carry out what the BOI found were clandestine communications rather than to have used a medium which could not be readily traced.

X. Mr. M. W. had testified that on 5 or 6 April 1997 he was visited by Mr. Y. D.who had given him details about his own bid and that of the next lowest bid and had persuaded him or intimidated him into withdrawing his tender, so that Mr. I. D. would get that part of the contract. Mr. I. D. was not available to be interviewed by the BOI.

The BOI found that at that time (namely on 5 or 6 April 1997) only three staff members of UNRWA (the Applicant, the SCO and the FSTO) had access to the analysis of the tenders and were therefore the only persons who could have leaked the information.

XI. The FSTO had been eliminated by the BOI as a possible suspect because he had increased the security surrounding the bidding process and, when Mr. M. W. had withdrawn his tender, it was the FSTO who had despatched staff members to investigate why this had occurred. It was also the FSTO, who had taken up the matter with the Acting Director of UNWRA Operations promptly and had requested the convening of the BOI. Accordingly, the BOI concluded that it had no reason to suspect that he was in any way involved in the dissemination of the confidential information.

XII. The BOI had also cleared the SCO, although its grounds for exonerating him are not so clear. He had been under suspicion, since he was undoubtedly in possession of the analysis of the tenders. It was he who had prepared the computer spreadsheet bid analysis. There is indication that he had been in contact by telephone with Mr. E. J. during the crucial time between the opening of the tenders and the withdrawal of the tender by Mr. M. W.

It seems to the Tribunal that the case against the SCO was somewhat similar to the case against the Applicant. Each was in possession of the information which was allegedly leaked and each had been in communication with Mr. E. J. during the critical time. It seems to the Tribunal that the only differentiation which can be made between them is that the BOI found the Applicant's demeanour to have been suspicious whereas it did not comment on the demeanour of the SCO at any time. The BOI did find that the SCO had voiced his suspicions to the FSTO about irregularities that had occurred during an earlier tender in 1995. It seems that since the BOI had accepted that he had tried to protect the integrity of the UNRWA tendering system in 1995, he could not have been responsible for the leaking of information which they found to have occurred in 1997. If this is the BOI's reason, it appears to the Tribunal to be unsound and certainly not sufficient to have exculpated the SCO to the extent that the BOI did not even interview him regarding the Applicant's allegations that Mr. E. J. had been examining papers on his desk on the occasion referred to. It appears to the Tribunal that this so called "process of elimination" has no reliability and would not withstand scrutiny. There is a further aspect which causes the Tribunal considerable concern. The BOI appears to have accepted Mr. M. W.'s evidence that he was not approached to withdraw his tender or given the information until 5 or 6 April 1997. If this was the case, why did the BOI find by implication that the confidential information had been leaked by the

Applicant between 1 and 3 April 1997, and why was Mr. M. W. not pressured into withdrawing his bid earlier?

XIII. The Tribunal is concerned that the findings of the BOI adverse to the Applicant were based as much on the drawing of unwarranted or unreasonable conclusions as on a scientific or reasonable analysis of the facts. It appears to the Tribunal that the exoneration of the SCO was more "an act of faith" on the part of the BOI than the conclusion of a rational deductive process.

XIV. The Applicant argues that the observations of the BOI and its conclusions drawn from the Applicant's references to the leak as "trivial" and to the amount involved as "peanuts" and the characterisation by the BOI of his attitude as disinvolved and disinterested were based on ambiguous evidence and that these inferences should not be considered as facts found or as facts consistent only with his involvement in the leaks. The Applicant also argues that his statements and attitude were generally consistent with the demeanour and behaviour of an innocent person who is confident in his own integrity and therefore does not consider the charges against him as a serious cause for concern. Accordingly, the Tribunal has given very serious consideration to the reasonableness of the BOI's findings concerning the inferences drawn against the Applicant arising from his demeanour.

Undoubtedly, the body which sees and hears the witnesses giving conflicting evidence of fact is the body best qualified to assess the demeanour of those involved and to express views as to truthfulness. The Tribunal finds that the situation was different here. The BOI's findings regarding the Applicant's demeanour arose from his testimony while expressing his opinions, rather than when he was asserting matters of fact.

XV. The Tribunal notes the following regarding the BOI's findings:

(1) The sinister inference drawn by the BOI from the fact that the Applicant had worked later than usual on 1 April 1997.

(2) The drawing of a sinister inference from the use of the Applicant's telephone at work between 1 and 3 April 1997 to communicate with Mr. E. J., even though the Applicant had proffered

innocent explanations, which were never evaluated, as to why such communications had taken place and he knew that the calls could be traced.

(3) The adverse inferences drawn by the BOI in characterising the Applicant's demeanour as evasive and uncooperative, when a benign interpretation appears to the Tribunal to have been equally appropriate.

(4) The reliance by the BOI on its belief that it had excluded all other potential suspects, by means of a process of elimination, which might have been incomplete.

XVI. The Tribunal is of the opinion that the conclusions of the BOI were unsatisfactory. The BOI apparently took the view that wrongdoing should not be found without the existence of "conclusive evidence". This is evident from its report. The Tribunal does not consider that the evidence that the Applicant was responsible for the leaks in question was conclusive. Whilst there was undoubtedly evidence which gave rise to the above suspicions, in the opinion of the Tribunal the BOI's analysis of the evidence was flawed. The BOI's findings accordingly, cannot be relied upon as justification for a decision to terminate the Applicant's services either for misconduct or in the interest of the Agency.

XVII. This being so, the Tribunal need not consider the findings of the JAB or the decision of the Commissioner-General, in the light of the report of the JAB. It is clear that the decision to terminate the Applicant for misconduct and the subsequent decision of the Commissioner-General to terminate the Applicant's services in the interest of the Agency were based on the acceptance by them of the BOI's findings. The Tribunal being satisfied that those findings were flawed, consequently finds that these decisions were inappropriate and unreasonable.

XVIII. In view of the foregoing, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 23 June 1997, to terminate the Applicant's appointment in the interest of the Agency;

2. Orders that the Applicant be reinstated in a position with the same grade and at the same step which he held when he was separated, with full payment of salary and emoluments from the date of his separation from service;

3. Should the Respondent, within 30 days of the notification of this judgement decide, in the interest of the Agency, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary.

XIX. All other pleas are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Kevin HAUGH
Member

Geneva, 2 August 2000

Maritza STRUYVENBERG
Executive Secretary

* * *

DISSENTING OPINION BY MR. CHITTHARAJAN FELIX AMERASINGHE

While I agree with the reasoning and conclusion of the Tribunal on the merits of the case, I dissent on the award of damages.

There are exceptional circumstances warranting the award of more than two years salary as compensation, particularly as the award would be in lieu of reinstatement. Exceptional circumstances depend on the nature of each case. Compensation is intended to compensate the Applicant and not necessarily to penalize the Respondent, though the Respondent's conduct in a given situation may result in treatment of the Applicant in a manner which merits compensation for, e.g., aggravated moral injury. On the other hand, the exceptional circumstances may lie entirely in the Applicant's particular situation.

Exceptional circumstances have been found to justify a higher award in cases such as *Dearing* (Judgement No. 200); *Beg* (Judgement No. 702); *Lehmann* (Judgement No. 807); and *Salama* (Judgement No. 936). In *Dearing*, as in the instant case, the Applicant's performance had been very good. It must also be remembered that the compensation being awarded here is in the event that reinstatement is refused, which contributes to the exceptional nature of the circumstances in the case.

(i) The Applicant's performance had recently been exceptional, as the reviews of 1995 and 1996 show;

(ii) He had been in the service of the Agency for 33 years from 1964 to 1997, from the age he was 21 to the age of 54;

(iii) The result of his termination was that he was deprived of the opportunity of working till he reached the mandatory age of retirement at 60 – in six years;

(iv) He was also deprived of the opportunity of working at least till he reached the age when he was eligible to receive the maximum permissible percentage of his relevant salary as a pension which would have occurred probably shortly before he reached the age of 60.

In my view these are the exceptional circumstances on which the award of damages should be based.

Should the Respondent decide not to reinstate the Applicant, in view of these exceptional circumstances an attempt should be made as far as possible by the award of compensation to put the Applicant in the position in which he would have been had he been reinstated. It is noted that the highest award of compensation the Tribunal has made is three years. In this case, however, I am of the opinion that particularly as the Applicant's promising career was cut short unjustly, the Applicant should be awarded four years of his net base salary at the rate in effect when he was separated, as compensation.

(Signatures)

Chittharanjan Felix AMERASINGHE
Member

Geneva, 2 August 2000

Maritza STRUYVENBERG
Executive Secretary